Does New Zealand's Immigration Policy Breach the Bill of Rights?

Kristina Ryan

Legal Writing Contribution
towards the LLB Honours degree
Faculty of Law
Victoria University of Wellington

1 September 1996

CONTENTS

DOES NEW ZEALAND'S IMMIGRATION POLICY BREACH THE BILL OF RIGHTS?

I INTRODUCTION

The question that this paper sets out to answer is whether or not New Zealand's immigration policy, or more precisely, the Government residence policy that sets out the criteria for immigration selection, breaches the New Zealand Bill of Rights Act 1990.[1]

Like most states, New Zealand generally developed immigration law in response to political pressure to exclude or favour particular migrants. Sometimes the objective of an enactment has been blatantly discriminatory. Examples include the Chinese Immigrants Act 1881, which the Government enacted to prevent an illusory invasion of Chinese migrant workers,[2] and the Immigrants Restriction Act 1889, which required all applicants to pass a dictation test in any European language. Following WWI, the New Zealand Government allegedly pursued a "White New Zealand" immigration policy.[3]

Whilst these laws have been replaced by the Immigration Act 1987, which on its face contains very few discriminatory provisions,[4] the heart of current immigration law is the policy contained in the Immigration Manual. This policy is not subjected to parliamentary scrutiny, and unless the Bill of Rights applies to it, there is no legal mechanism to prevent that policy discriminating on grounds that are prohibited in other areas of public and private activity.

---

[1]Immigration policy controlling temporary entry may also be discriminatory. One source of discrimination may be the criteria that is used to identify potential overstayers. This possibility is illustrated by the Canadian case *Naqvi v Canada (Employment and Immigration Commission)* [1993] 2 CHRD 57. An immigration official denied Ms Naqvi a visa because he believed that she was likely to become an illegal overstayer. His belief was not supported by any objective evidence of the applicant's intention, but was based on the fact that she was a single, female Pakistani. The Canadian Human Rights Tribunal accepted that there was unjustified discrimination.

[2]See W Borrie *Immigration to New Zealand 1854 -1938* (Demography Programme, Research School of Social Sciences, Australian National University, Canberra, 1991) 170-176. At the time the Act was passed the number of Chinese migrants was steadily declining.

[3] S Brawley "No 'White Policy' in NZ: Fact and Fiction in New Zealand's Asian Immigration Record, 1945-1978" (1993) 27 NZ Jnl History 16.

[4]For example s4 discriminates between New Zealand citizens and aliens when it says that New Zealand citizens do not have to have a residence permit. This will not be in breach of the Bill of Rights because s6 of the Act allows inconsistent enactments to prevail.

The question that this paper raises requires an examination of the legal status of immigration policy and the interface between the Bill of Rights and the Human Rights Act. These will be addressed in parts III and IV. Part V identifies prima facie infringements of the Act. Part VI discusses the operational provisions of the Act and applies them to the policy to ascertain whether there is an actual breach.

II BACKGROUND

Immigration is widely regarded as a sovereign power of state.[5] Whilst international lawyers may dispute whether this is correct, or whether the state enjoys an absolute power,[6] the judiciary in Common Law jurisdictions has tended to adopt an especial deference to the state in matters concerning immigration because of it. This deference has tended to make it difficult for applicants to succeed in judicial review of decisions in immigration cases.[7] In the United States it has led to conservative resolutions of the constitutional issues that immigration cases have raised.[8] In Canada there has been similar reluctance to extend human rights protection in immigration cases.[9] The same may be true of New Zealand courts. However, whilst this approach may have been acceptable in the past, New Zealand's international human rights commitments now demand that the state affords members and non-members the same right to freedom from discrimination.[10]

III GOVERNMENT RESIDENCE POLICY - ITS STATUS AND CONTENT

A The Legal Status of Government Residence Policy

Traditionally, New Zealand's immigration policies have been purely voluntary rules with no legal effect. However the authorising provisions of the Immigration Act 1987 suggest

---

[5]R Plender *International Migration Law* (2ed Martinus Nijhoff Publishers, Norwell, MA, 1988) 61-62.

[6]See above n 5, 75-77.

[7]SH Legomsky *Immigration and the Judiciary: Law and Politics in Britain and America* (Clarendon Press, Oxford, 1987) ch1.

[8]See above n 7, 325.

[9]C Tie "Immigrant Selection and the Canadian Human Rights Act" (1994) 10 JL & Soc Pol'y, 81.

[10]New Zealand has signed numerous international human rights treaties, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant of Economic, Social and Cultural Rights, and the International Convention on the Elimination of all Forms of Racial Discrimination. See P Hunt and M Bedggood " The International Law Dimension of Human Rights in New Zealand in G Huscroft and P Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1991* (Brooker's Ltd, Wellington, 1995) 43-45.

that, at least in part, the policy now falls into a grey area called "administrative quasi-legislation"[11] The term "quasi-legislation" covers a wide range of rules that have varying degrees of legal effect. Their only common feature is that they are not enforceable directly through criminal or civil proceedings.[12] There are as yet, no definitive rules for determining whether quasi-legislation is "law" or merely administrative rules.[13] Although it is outside the scope of this paper to provide a definitive answer on the legal status of immigration law, a brief discussion may clarify some of the issues and enable an assumption to be drawn.

1 *The relevant provisions of the Immigration Act*

The Immigration Act 1987 reformed the numerous immigration enactments and amendments that dated back to 1919.[14] In 1991, Parliament amended the Act to include new provisions concerning Government residence policy and the Minister's discretionary power to grant permits and visas. Sections 8, 9, and 10 empower the Minister, or authorised immigration officials, to grant residence or temporary permits and visas at their discretion. Section 13A instructs the Minister to publish Government immigration policy, regarding the rules and criteria used to determine eligibility for the grant of visas and permits. Publication includes, but is not limited to, insertion of the policy in the departmental manual of immigration instructions, and making the manual available to the public.

Under s13B, the Minister must reduce Government residence policy to writing and certify it before it is published. Section 13B(3) defines the kinds of policy that can be Government residence policy, for example, rules or criteria for determining the eligibility of applicants, and any general or specific objectives of the Government. Section 13C(1) requires immigration officers to make decisions about residency applications in terms of the policy. The Minister is similarly bound to make decisions in terms of the policy but retains a discretion to issue visas or permits as an exception to the policy in any particular case.[15] A right of appeal to the Residence Appeal Authority[16] lies against the decision of immigration officials to refuse residence visas or permits. The grounds of appeal are that

---

[11] G Ganz *Quasi-Legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell, London, 1987) 1.
[12] See above n 11.
[13] See R Baldwin and J Houghton "Circular Arguments: the Status and legitimacy of Administrative Rules" [1986] Public Law 239.
[14] Immigration Act 1987, Second Schedule.
[15] Section 13C(1)-(2).
[16] The Residence Appeal Authority is set up under s18B of the Immigration Act.

the refusal of an application was not correct in terms of the Government residence policy, or that special circumstances require consideration of an exception. However, there is no right of appeal from the Minister's decision.[17]

2 *Policy or law?*

The question of the legal status of immigration policy published under the 1991 amendments has never come before the New Zealand Courts.[18] Despite the amendments, the Court of Appeal has continued to treat the policy as voluntarily adopted rules in the context of judicial review.[19] However, the new provisions suggest that this view may be incorrect. Legal status is not determined by the form that the rules appear in, nor whether they were placed before the House of Representatives, although these are relevant in deciding what is law. Ultimately, the court must examine the legitimacy and nature of particular rules to determine what legal force they have.[20] Clearly, Government residence policy has some legal effect because it is binding on the Residence Appeal Authority, the immigration officers and to a limited extent, the Minister. However, the Minister retains an ultimate discretion that is not fettered by the policy. This must lead to the conclusion that immigration policies are still only policies, not law. To hold otherwise would be to impose a limit on the Minister's power to grant visas and permits, as an exception to the policy, or to refuse entry to those who satisfy the policy. This is not the intended effect of the empowering provisions of the Immigration Act. This conclusion is important because it affects the application of the Bill of Rights, which will be discussed in part VI.

B *Residence Application Categories*

Immigration policies are published in the Immigration Manual, a single volume[21] that details the administrative procedures and requirements that applicants for temporary and permanent entry must follow. It also sets out the residence application categories and selection criteria. Most applicants seeking residency visas or permits must apply under

---

[17]Sections 8(2), 10(2), and 18C(1)-(2).

[18]The question of the status of English immigration rules has come before the House of Lords. In *R v Chief Immigration Officer, ex p. Bibi* [1976] 1 WLR 979, Roskill LJ. held that the rules, which had some legal effect and could be vetoed by parliament, were just as much delegated legislation as any other form of rule-making power. However in subsequent cases the House of Lords has retreated from this view.

[19]See *Chiu v Minister of Immigration* [1994] 2 NZLR 541.

[20]See above n 11, 4; n 13, 246-247.

[21]The previous version of the manual was spread over four volumes but the old policy was replaced on October 31 1995.

one the following categories: General Skills, Business Investor, Family, or Humanitarian. There are also special categories for Pitcairn Islanders and Western Samoans, and a separate category for refugees.[22] Generally, primary applicants can include spouses and dependent children on their application.

All applicants must satisfy the general requirements of "good health" and "good character." [23] In addition to the general requirements, there are category specific requirements. The General Skills and Business Investor categories operate on a points system. Applicants get points for each criterion that they satisfy. Applicants with fewer than a specified number of points will automatically be denied entry. The Minister may raise or lower the cut-off mark, to keep migrant numbers within the Government's target.[24] Both categories require the primary applicant, and any family members who apply under the primary application, to satisfy a minimum English language requirement.[25] Under the General Skills category, applicants score points for factors such as qualifications, work experience, and age. Applicants under the Business Investor category score points for factors such as business investment funds, business experience, qualifications, work experience, and age.

The Family category allows people to apply on the basis that they have a relationship with a New Zealand citizen or resident, or have immediate family members permanently residing in New Zealand. Applicants may apply under the Humanitarian category only if they have the support of a close family member residing permanently in New Zealand, and are in circumstances that are causing serious physical or emotional harm to the applicant or a family member, which can only be resolved by granting residence.

Special categories include schemes set up to deal with particular ethnic groups; for example, the Western Samoa quota scheme, and a special entry policy for Pitcairn Islanders. Entry requirements are significantly lower for these applicants.

---

[22]The policy relating to refugees is not examined in this paper.
[23]New Zealand Immigration Service Operational Manual, pols 1.19 and 1.20.
[24]See above n 23 pol 3.9.
[25]See above n 23 pol 13.15

IV DOES THE BILL OF RIGHTS APPLY TO GOVERNMENT RESIDENCE POLICY?

Immigration selection appears to fall squarely within s3 of the Bill of Rights, which says that the Act applies to acts of the legislative, executive, and judicial branches of the Government of New Zealand. However this presumption does not take into account two problems raised by s19 of the Bill of Rights and the Human Rights Act 1993. Before discussing the problems, the relevant background and provisions of the Human Rights Act will be set out.

A Section 19 of the Bill of Rights

When the Bill of Rights was enacted in 1990, s19 affirmed the right to be free from discrimination on seven grounds. These grounds were: colour, race, ethnic or national origins, sex, marital status, and religious or ethical belief. The Bill of Rights did not include any specific limits on those grounds, although s5 said generally, that reasonable limits are allowed. Under this version of s19, there was no doubt that the Government residence policy could not discriminate on the prohibited grounds.[26] However, in 1993 the Human Rights Act was introduced. Section 21(1) of the Act contained an expanded list of prohibited grounds of discrimination. Subsections (a) to (g) covered the seven grounds that are listed above. In addition there were six new grounds in subsections (h) to (m): disability, age, political opinion, employment status, family status, and sexual orientation.

The new Act also amended s19 of the Bill of Rights. Now s19 no longer lists prohibited grounds of discrimination, instead it says that the prohibited grounds are those contained in the Human Rights Act. This requires us to turn to s21 of the Human Rights Act when applying s19 of the Bill of Rights.

B Relevant Provisions of the Human Rights Act

The Human Rights Act also contains provisions limiting the scope of the prohibited grounds of discrimination. These provisions may affect the application of s19 of the Bill

---

[26] PA Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Ltd, Sydney, 1993) 853.

of Rights. Two provisions are of particular importance. These provisions are:

> 151(1) Except as expressly provided in this Act, nothing in this Act shall limit or affect the provisions of any other act or regulation which is in force in New Zealand.
>
> (2) Except as expressly provided in this Act, nothing in this Act relating to grounds of prohibited discrimination other than those described in paragraphs (a) to (g) of section 21(1) of this Act shall affect anything done by or on behalf of the Government of New Zealand.

> 153(3) Nothing in this Act shall affect any enactment or rule of law, or any policy or administrative practice of the Government of New Zealand, that -
>
> (a) Relates to immigration; or
>
> (b) Distinguishes between New Zealand citizens and other persons, or between British subjects or Commonwealth citizens and aliens.

Section 152 says that on 31 December 1999, s151 will expire. Until then however, s151(2) says that only the seven grounds set out in s21(1)(a) to (g) will apply to acts of the Government. Section 153 seems to say that the Government may discriminate on any grounds in immigration matters.

C *The Effect of the Human Rights Act on the Bill of Rights*

The first issue that the Human Rights Act raises is whether the amendment to s19 carried the limits in sections 151 and 153 through to the Bill of Rights. The question requires statutory interpretation of the provisions that amended s19. The amending provision is in s145 of the Human Rights Act. It says:

> 145 **Related amendments to other enactments** - The enactments specified in the Second Schedule to this Act are hereby amended in the manner indicated in the Schedule.

The Second Schedule says:

> The New Zealand Bill of Rights Act 1990 [is amended] by repealing section 19 and substituting the following section: "19. **Freedom from discrimination -**

(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993....."

There is nothing in the wording of s145 or the schedule to suggest that s19 implicitly includes these, or any other limitations contained in the Human Rights Act.[27] However, it is not yet possible to conclude that the Human Rights Act does not affect s19. This is because s4 of the Bill of Rights says that legislation that is inconsistent with the Bill of Rights will prevail over it. Does this mean that where the Human Rights Act allows the Government to discriminate, it must prevail over the Bill of Rights?

The question can be answered by turning to s151(1) of the Human Rights Act (set out above), which says that the Human Rights Act does not affect any other legislation. This means that, at least until s151 expires, neither Act can affect the other. They stand as two separate remedies. This was probably the Government's intention since, although the it contains no specific limits, the Bill of Rights does not make the rights it affirms absolute. The rights can be restricted by reasonable limits and the Government can pass legislation that authorises infringements of the rights.

Although no case has settled the matter, the recent High Court case *Quilter v The Attorney General*[28] lends some support to the view that the Human Rights Act does not affect the Bill of Rights. This case concerned the right of lesbian couples to obtain a marriage licence. It was brought under s19 of the Bill of Rights, for discrimination on the ground of sexual orientation [s21(1)(m) of the Human Rights Act]. Because of s151(2) no right of action was available under the Human Rights Act for discrimination on this ground by the Government. The Court did not consider the effect of s151(2) on the Bill of Rights. However the fact that it heard the case and made a finding under the Bill of Rights suggests that it believes that the Bill of Rights stands as a separate right of action, which can be used when a matter is excluded from the Human Rights Act.

If the argument that the Bill of Rights is not affected by the Human Rights Act is wrong, then until 31 December 1999, s19 is limited to the seven grounds in s21(1)(h) to (m) of the Human Rights Act. However s153 may not prevent the effective provisions of s19

---

[27]Even if two interpretations of s19 were available, the long title of the Act would require the interpretation most favourable to the protection of the rights to be adopted. The long title says: An Act (a) to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and (b) to affirm New Zealand's commitment to the International Covenant of Civil and Political Rights. In order to affirm New Zealand's commitment to the Covenant, the rights need to be consistent with it. The prohibited grounds are already more restricted in New Zealand and if s19 was interpreted as very limited, the inconsistency would become much greater.

[28]Unreported, 28 May 1996, High Court, Auckland Registry, M.177/96.

from applying to immigration selection. Chauvel has suggested that immigration selection never fell within the scope of the Human Rights Act, so s153 does not authorise discrimination in this area (nor does it prohibit it).[29] This means that there is no inconsistency between the Bill of Rights and the Human Rights in respect of immigration selection.[30] Although Chauvel's argument is interesting, when s151(1) of the Human Rights Act is taken into account the Bill of Rights stands as a separate remedy.

V PRIMA FACIE INFRINGEMENTS OF THE BILL OF RIGHTS

The policies described below are prima facie in breach of the Bill of Rights because they discriminate on prohibited grounds:

1 General requirements

(a) Good health

All applicants for temporary entry and permanent residency must be in good health. The applicant must furnish acceptable medical and X-ray certificates, and may be assessed by a consultant physician. The physician may determine that an applicant is not in good health if she or he is:

(i) likely to be a danger to the public health; and /or
(ii) likely to be a burden on the health services; and/or
(iii) unfit for the purpose of entry

Section 21(1)(h) of the Human Rights Act prohibits discrimination on the basis of disability, which includes physical, psychological, or intellectual disability; illness; or the presence in the body of organisms capable of causing illness.

---

[29]C Chauvel "New Zealand's Unlawful Immigration Policy" (1994) 4 Aust Gay & Lesbian LJ 78. Chauvel's argument must be based on the premise that the granting of visas and permits does not fall within the meaning of "services" in the context of the sections prohibiting discrimination in the provision of goods, services, and facilities. This interpretation is supported by *Amin v Entry Clearance Officer, Bombay* [1983] 2 All ER 864. In this case the House of Lords held that granting entry vouchers was not the provision of a "service" to immigrants but the performance of a duty of controlling immigration.

[30]See above n 29, 77-78. Chauvel argues that this interpretation does not render s153 meaningless; it will still apply where immigration matters fall within the various provisions of the Human Rights Act. He gives as an example, the Department of Labour's practice of employing only New Zealand citizens for certain immigration positions. In this respect the Human Rights Act is inconsistent with the Bill of Rights, and would prevail.

(b) *Polygamous marriages*

A principal applicant in a polygamous marriage is allowed to have only one partner approved for residence. Other partners may not subsequently apply for residency based on their relationship with a successful applicant. This provision discriminates on the ground of marital status in s21(1)(b) of the Human Rights Act. The common law definition of marriage applicable in New Zealand is limited to one male and one female,[31] but if the applicants' marriage is legal in their own country it will be recognised as a valid marriage in New Zealand.[32]

If the practice is based on religious belief it may also fall under s15 of the Bill of Rights, which affirms the right of every person "to manifest that person's religion in...practice." It may also fall under s20, which affirms the rights of minorities in New Zealand to enjoy their culture. The policy prima facie infringes the Bill of Rights on the first ground and possibly the other two grounds.

2 ***General Skills and Business Investor criteria***

(a) *Age*

Applicants in the General Skills and Business Investor categories receive points on the basis of their age (see *table 1*). Applicants over the age of 56 are not eligible to apply under the General Skills category.[33] Applicants over the age of 64 cannot apply under the Business Investor Category.[34] The scheme discriminates on the basis of age, which is prohibited by s21(1)(i) of the Human Rights Act.

However, subsection (i) gives a narrow definition of "age." Until 31 January 1999, "age" means any age commencing with the age of sixteen years and ending with the age that people in general qualify for national superannuation under s3 of the Social Welfare (Transitional Provisions) Act 1990.[35] This means that the age limit on applicants under the Business Investor category is not "age discrimination." The

---

[31]*Hyde v Hyde & Woodmansee* (1966) [1861-73] All ER 175

[32]*Halsbury's Laws of England* (4 ed, Butterworths, London, 1980) vol 8, Conflict of Laws, para 478, p349; *New Zealand Commentary on Halsbury's Laws of England* (4 ed, Butterworths, Wellington, 1985) binder C, Conflict of Laws, para C478.

[33]See above n 23, pol 3.19.

[34]See above n 23, pol 3.42.

[35]Under the s3 of the Transitional Provisions, the qualifying age for national superannuation is gradually increasing from 60 to 65 years.

policy does discriminate against people between the ages of 16 and the qualifying age for national superannuation, firstly by awarding different points to different age groups, and secondly, by not including people aged 16 or 17 years in the General Skills category.

Table 1:

General Skills

Age	Points
18-24	8
25-29	10
30-34	8
35-39	6
40-44	4

Business Investor

Age	Points
0-24	0
25-29	10
30-34	8
35-39	6
40-44	4
45-49	2
50-54	0
55-59	-2
60-64	-4

(b) *Homosexual partners*

Homosexual partners are only eligible for residence if their partners are New Zealand citizens or residents. This means that primary applicants under the General Skills or Business Investor categories who are in homosexual relationships, will not be able to include their partners on their application. Section 21(1)(m) of the Human Rights Act prohibits discrimination on the basis of sexual orientation. This provision also prima facie infringes the Bill of Rights.

(c) *English language requirement*

Primary applicants under the General Skills and Business Investor categories are required to satisfy the minimum English language requirements set out in the manual. If primary applicants include on their applications a spouse or partner, or any dependants aged sixteen or more, these family members must satisfy the language requirement. If the family members do not speak enough English, the application may be granted on the condition that the applicants pay a bond.[36]

[36]Applicants must provide a certificate of the International English Language Testing System (IELTS) or evidence that they have an English speaking background. A bond of $NZ 20 000 is required for every non-principal applicant over 16 years included in the application of the principal applicant, who does not meet the English language requirement. The bond is repaid if the applicants pass the language requirement within a certain time of settling in New Zealand.

On its face, this policy seems not to discriminate on any of the prohibited grounds. However, by imposing a greater obstacle for people of non-English speaking countries, the policy effectively discriminates on the grounds of race, ethnicity, or nationality. The Canadian Supreme Court has adopted a doctrine of "adverse effects discrimination."[37] The doctrine expands discrimination to include "the imposition of obligations, penalties, or restrictive conditions that result from a policy or practice which is on its face neutral but which has a disproportionately negative effect on an in individual or group because of a special characteristic of that individual or group."[38] The Human Rights Act explicitly covers such discrimination in s65. This approach is desirable in the context of the Bill of Rights. If it is adopted then the language requirement would constitute discrimination on the basis of race, ethnicity, or nationality, which is prohibited by subsections (f) and (g) of the Human Rights Act.

(d) Minimum work experience

Applicants cannot apply under the General Skills category if they have less than two years work experience related to the qualifications that they have claimed points for. Discriminating against people on the basis of their work experience is not discriminatory per se, but it could result in adverse effects discrimination by excluding some unemployed people. The unemployed people who would be excluded are those that do not satisfy the minimum relevant work experience. This is inconsistent with the prohibited ground of employment status in s21(1)(k), which includes being unemployed.

---

[37] *Ontario Human Rights Commission and O'Malley v Simpson Sears* [1985] 2 SCR 536, 551; *Menghani v Canada (Employment and Immigration Commission)* [1992] 4 CHRD 41, 53.
[38] See *Menghani*, above n6, 55.

3 *Family Criteria*

(a) *Married siblings or children*

Potential migrants who apply under the Family category, as siblings or adult children of New Zealand citizens or residents, must be single. Section 21(1)(b) of the Human Rights Act prohibits discrimination on the grounds of marital status which includes being married. The policy discriminates on this ground.

(b) *Homosexual couples*

Homosexual couples must live together for four years before they are eligible to apply as defacto partners. In contrast, heterosexual must only live together for two years. This policy is inconsistent with s21(1)(m), sexual orientation; and possibly subsections (b), marital status, and (l), family status.[39]

4 *Special Category - Pitcairn Island Policy*

The Pitcairn Islander policy makes it easier for people of one nationality to enter New Zealand. This is inconsistent with the s21(1)(g) ground of nationality.

VI IS THERE A BREACH OF THE BILL OF RIGHTS?

A *How Should the Operational Provisions be Applied?*

The Bill of Rights contains three operational provisions, sections 4, 5, and 6, which instruct the court on how to apply the Bill to acts of the government. Since the Bill of Rights came into effect, these provisions have generated a considerable amount of judicial and academic comment but it is still not clear how the provisions should be applied.[40]

---

[39]This policy was identified and discussed by Chauvel, see above n 29.

[40]See J Elkind "On the Limited Applicability of Section 4 of the Bill of Rights" [1993] NZLJ 111; P Rishworth "Applying the New Zealand Bill of Rights Act 1990 to Statutes" [1991] NZLR 337; J McClean, P Rishworth, and M Taggert "The Impact of the New Zealand Bill of Rights on Administrative Law" The New Zealand Bill of Rights Act 1990 (Legal Research Foundation Seminar, 1992) 62; P Rishworth "How does the Bill of Rights Work? [1992] NZRLR 189.

Two approaches are identified and used in this paper. Before discussing the approaches, it will be helpful to set the provisions out in full:

> **s4** **Other enactments not affected** - No court shall, in relation to any enactment....
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
> (b) Decline to apply any provision of the enactment-
> by reason only that the provision is inconsistent with any provision of this Bill of Rights
>
> **s5** **Justified limitations** - Subject to s4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **s6** **Interpretation consistent with bill of rights to be preferred** - Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The leading case on the application of the operational provisions is *Ministry of Transport v Noort*.[41] It does not however, provide a definitive approach to the application of the provisions because the Court of Appeal was split. Cooke P. and Gault J. thought that the inquiry should begin with s6 so that wherever possible, a meaning consistent with the Bill of Rights is adopted. If the courts cannot find a meaning consistent with the Bill of Rights, then s4 requires that the inconsistent enactment will prevail. According to Cooke P. and Gault J., s5 was relevant only when the courts were addressing a common law limit or when the Attorney-General reported to the House of Parliament, as required by s7. The rest of the Court saw a place for s5 in interpreting statutory provisions. For Richardson J. (McKay concurring), s5 preceded s6. For Hardie Boys J., s5 allowed an enactment to be consistent with the Bill of Rights if it imposed only reasonable limits.[42] As yet there is no precedent that applies these provisions in the administrative law area.

---

[41][1992] 3 NZLR 260.
[42]See above n 26, 856-861.

Since the Government residence policy is not law, it does not fall within the meaning of s4.[43] However, the authorising provisions of the Immigration Act do, so it is necessary to see whether they are consistent with the Bill of Rights or whether they authorise breaches.

The first approach adopted here to ascertain a breach, is based on the judgments of Cooke P. and Gault J. It gives primacy to s6 with the result that if a consistent interpretation of the empowering provision is available the courts must adopt it. Section 4 will only come into play if there is no possible interpretation consistent with the Bill of Rights, and s5 does not come into play at all. This approach gives the greatest protection to the rights and freedoms in the context of delegated powers because it prevents the erosion of rights by reasonable limits. This point will become more apparent when the results under the two approaches are compared.

It may be arguable that the first approach makes s5 redundant. For this reason, the provisions will also be analysed under a second approach that combines s6 and s5. This approach is consistent with Hardie Boys' view of the role of s5.[44] This refocusses the inquiry on whether there are reasonable limits on the rights in question. If there are, then these limits are not in breach of the Bill of Rights but are part of an interpretation that is consistent with it.

B Giving Primacy to Section 6

The Minister of Immigration, as a member of the Executive, is bound by s3 to obey the Bill of Rights unless Parliament gives him a statutory authority to infringe it. In that case, s4 says that the empowering statutory provision will prevail over the rights and excuse the prima facie infringement. The question that s6 raises is whether the empowering provisions can be interpreted to permit the Minister to certify and apply only policies that are consistent with the Bill of Rights. Section 6 is not limited to cases of statutory ambiguity but extends to apparently clear statutes, with broad or vague wording, including broadly worded discretionary powers.[45] McLean, Rishworth, and Taggart have argued that empowering provisions can be interpreted consistently with the Bill of Rights. This is achieved by reading into the provision an implicit proviso that the discretion must not be

---

[43]For a discussion of the meaning of "enactment" in the context of the Bill of Rights see above n 29, 78-79.

[44]See above n 41, 287. This approach was also adopted by McClean et al, see above n 40.

[45]P Rishworth and S Optican "Two Comments in *Ministry of Transport v Noort*" [1992] NZRL 189, 191 n 8.

exercised so as to infringe the Bill of Rights.[46] Thus s13A authorises the Minister to certify Government residence policy so long as it is with in the kinds of policy allowed by s13B and does not infringe the Bill of Rights.

This analysis is consistent with the view that discretionary powers are not absolute but are subject to implicit limitations. The common law limitations include the judicial review concepts of "reasonableness" and "relevance."[47] There is no reason why the Bill of Rights should not implicitly impose a statutory limitation. It must be presumed that Parliament would not intend delegated powers to be used inconsistently with the Bill of Rights, since this would open a backdoor to breaches of fundamental human rights. This would be at odds with the purpose of the Act and with the fact that Parliament has required itself to disclose any inconsistencies with the Bill of Rights in proposed legislation.[48]

Reading in a proviso is supported by the Canadian Supreme Court's approach under the Canadian Charter of Rights and Freedoms. In *Slaight Communications Inc v Davidson*, the Supreme Court held that "it is impossible to interpret legislation conferring a discretion as conferring a power to infringe the Charter - unless of course that power is expressly conferred or necessarily implied."[49] In New Zealand, if the empowering provision expressly or necessarily implies that the Minister has the power to infringe the Bill of Rights, then by virtue of s4, the empowering provision prevails and the prima facie infringements are excused.

There is nothing express, nor necessarily implicit, in the empowering provisions of the Immigration Act to authorise an infringement of the Bill of Rights. Section13B(3)(a) authorises as Government residence policy any rules or criteria for determining an applicant's eligibility, being rules or criteria relating to the circumstances of that person. The effect of the provision is not substantially undermined if the criteria cannot be discriminatory in terms of s19 of the Bill of Rights. The Immigration Manual already contains many policies that have not been found to be prima facie infringing. Therefore the provision does not "necessarily imply" that the Minister can breach the Bill of Rights. In conclusion, the empowering provisions of the Immigration Act can be interpreted consistently with the Bill of Rights and furthermore and s6 demands that this consistent interpretation be adopted. This means that the Minister has no power to act inconsistently with the Bill of Rights and all of the infringing policies are ultra vires the Immigration Act and in breach of the Bill of Rights.

---

[46]See McLean above n 40, 71.
[47]See above n 46.
[48]New Zealand Bill of Rights Act 1990 s7.
[49]59 DLR (4th) 416, 444.

C *Reading Sections 5 and 6 Together*

This approach requires the court to interpret the empowering provisions of the Immigration Act as including the proviso "but not so as to *unreasonably* infringe the Bill of Rights." For the reasons already given under the first approach, this proviso can be read in. The difference between the two approaches is that in the first instance any infringements constitute a breach, but in the second instance only those limits that are unreasonable will constitute a breach.

The next step is to see whether the limits imposed by the residence policy are reasonable. Section 5 requires a two-step inquiry. Firstly, it must be shown that the policy is prescribed by law; secondly, it must be shown that it imposes reasonable limits that are justified in a free and democratic society.

The New Zealand courts have not defined a test for either step. In *Noort,* the Court of Appeal discussed the definition of "prescribed by law" and expressed approval for the approach taken in Canadian cases.[50] The Canadian Supreme court had held that the phrase included (but wasn't necessarily limited to) statutes, regulations, the operating requirements of a statute or regulation, or the common law.[51] This list did not include rules made under a discretionary power. For a time, the Canadian courts were uncertain whether the latter came within the phrase "prescribed by law" but the Supreme Court eventually settled the question in *Slaight.* The Court held that limitations on Charter rights imposed by discretionary powers were "prescribed by law." This was because the holder of the power derives that power from statute. "It is the legislative provision conferring discretion which limits the right to freedom, since it is what authorises the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the Charter."[52] McLean et al argue that unless New Zealand courts adopt the *Slaight* approach, s5 will never have any effect.[53] Under this approach there is no doubt that the Government residence policy is prescribed by law.

In *Noort,* Richardson J provided the only discussion of the parameters of a "reasonable limits" test. He suggested that the more advanced Canadian jurisprudence would provide helpful guidelines and gave conditional support for the *Oakes* test.[54] Under this test the

---

[50]See above n 41, 260.
[51]*R v Thomsen* (1988) 63 CR (3d) 1.
[52]See above n 49, 446.
[53]See McLean, above n 40, 77.
[54]Named after *R v Oakes* [1986] 1 SCR 103, 134.

onus of proving the reasonableness of the limit falls on the party defending the policy. The version of the test set out here comes from *R v Chaulk*:[55]

1 The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important.

2 Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; and
(b) impair the right or freedom in question as little as possible; and
(c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

Whilst the New Zealand courts may ultimately create their own test for reasonable limits, the *Oakes* test provides a useful basis of inquiry for this paper. In the next section the test will be applied to the prima facie infringing residence policies to determine whether they are reasonable limits.

1 The importance of the objective

(a) Good health requirement objective

No specific objective is given for this policy in the Immigration Manual but the "Self Assessment Guide for Residence in New Zealand," which is published by the New Zealand Immigration Service does give an objective. It says that the requirement is to ensure that the applicants do not require extensive medical treatment or care, or cause others to become ill while in New Zealand. This objective is likely to be sufficiently important to warrant limits on the right to freedom from discrimination.

---

[55](1991) 2 CR (4th) 1, 27-28. This version of the test is adopted here because it contains the same elements as the original version from *Oakes* but has the merit of being more simply set out. In their discussion of the application of the Bill of Rights to Administrative Law, McLean et al also applied this version of the *Oakes* test. See above n 40.

(b) *Residence policy objectives*

The Immigration Manual contains the following objectives for Government residence policy:

(i) *Generic residence policy objectives:*

- to contribute to the Governments Growth strategies with social cohesion; and
- to maintain provision for migrants to enter New Zealand for social and humanitarian reasons

(ii) *Specific General Skills and Business Investor category objectives:*

- to select migrants who can contribute to growth strategies over the medium term through:
  - increasing overall levels of human capital, enterprise, and innovation; and
  - fostering international links

(iii) *Specific Family category objectives:*

- to permit New Zealand citizens or residents to be joined in New Zealand by their eligible spouses, partners, parents, siblings, adult children, or dependant children; and
- to provide avenues through which immigrants who have already settled in New Zealand may sponsor the entry of other eligible members of their immediate family; and help them settle by providing practical and emotional support.

Since immigration is a highly political issue, these objectives are arguably all important enough to warrant limiting rights. As noted above, the onus of proving this is on the Government. However, it has been pointed out that the courts will be very unlikely to find that the objective wasn't sufficiently important, because they are reluctant to hold that the Government acted without good reason.[56]

(c) *Pitcairn Island policy objective*

The objective of this policy is to assist the Pitcairn Islanders because there are few employment opportunities on the Island. This will probably satisfy the requirement of being a sufficiently important objective.

---

[56]See McLean, above n 40, 78.

2 *Proportionality of means*

This part of the test involves three aspects. The first is rationality, the second is least possible impairment of the rights; the third is whether the limit is proportionate to the importance of the objective. To make it easier to compare the objectives and the policies, the policies have been grouped under the relevant application categories.

(a) General good health requirement

The policy is rationally connected to its objectives and the least limiting option has probably been chosen. The courts almost certainly would find that the objective of ensuring public safety outweighs the harm caused by the policy of refusing entry to people with serious contagious diseases. They will probably find that the objective of avoiding a burden on the public health system would outweigh the harm caused by not allowing entry to people who have poor health but do not carry contagious diseases. This is because the public health service results from a "contract" between citizens and the state and because the state could not support the financial cost of allowing immigrants to come here for the purpose of receiving free health. Since this limit satisfies all three requirements of proportionality, it is a reasonable one.

(b) General skills and investor categories

(i) Polygamous marriages

If a polygamous marriages is recognised in the country where it was performed, it will also be recognised in New Zealand. No law is breached and there is no rational connection between this policy and the objectives. There is no need to assess the policy in terms of the remaining requirements of proportionality if it fails the first one. This policy is not a reasonable. limit?

(ii) Age

Under the Business Investor and General Skills categories, the Government is concerned with medium term growth and increasing human capital. Age is relevant to these objectives because people who are closer to retirement age will add less in terms of the objectives. This probably means that the maximum age limits in each category are the least impairing option and are proportionate to the importance of the objectives. However, there is no reason why a 24 year old must receive fewer points than a 25 year old or a 28 year old. The age bands are too narrow to be the least infringing option. In addition, the bands ought to begin at 16 years because it is the commencing age for the ground of age

discrimination. Since the policy fails the second proportionality requirement it is not a reasonable limit.

(iii) Homosexual partners

There is no rational connection between the objectives and the policy of denying primary applicants, who are in homosexual relationships, the right to include their partners on their application. This policy is not a reasonable limit.

(iv) Language requirement

The policy requiring *secondary* applicants to speak English is not rationally connected to the specific objectives of the Business Investor and General Skills categories. It may be rationally connected to the general objective of providing for growth with social cohesion, if social cohesion depends on all members of our society speaking the same language. However, the Government could not accept this view of social cohesion since New Zealand has two official languages.[57] If social cohesion does not depend on everyone speaking the same language, there is no rational connection between the policy and the stated objectives, so it must be an unreasonable limit.

Speaking English may be essential to a *primary* applicant's ability to contribute to the Government's growth strategies through increasing the level of human capital and enterprise. If so, there is a rational connection between the policy and this objective. However, the policy does not impair the right as little as possible. This is because a primary applicant who satisfies the minimum English requirement, but includes her or his family on the application, will not get a visa or permit unless the other family members satisfy the language requirement or they pay a large bond.

Since it has already been argued that the policy concerning secondary applicants is unreasonable, the requirements imposed on the primary applicant seem unnecessarily restrictive. In any case, the objective is not to be proportionate to the harm of discriminating on the basis of immutable characteristics such as race. This policy is not a reasonable limit.

(v) Minimum work experience

This policy seems to be based on an assumption that a recently qualified graduate or tradesperson with less than two years relevant work experience is

[57]Maori and English. Maori was made an official language by the Maori Language Act 1987.

less able to contribute to the Governments objectives than someone with the work experience. There is probably no evidence to support this assumption so the policy is not rationally connected to its objectives. Even if there were a rational basis to this policy, it would not be the least limiting option. The least limiting option would be to allow unemployed people with no relevant work experience to apply on the basis that they compete against those who have work experience and who will receive additional points for their experience. Since it results in indirect discrimination against unemployed people who have not yet obtained work in the field that they have qualified in, this policy is not a reasonable limit.

(b) Family

(i) Polygamous marriages

The arguments made under the Business Skills and Investor categories also apply under the Family category.

(ii) Married siblings or children

There is no apparent connection between this policy and the general objectives. It is connected to the first Family category objective but only because the objective refers to "eligible" family. If this word were removed then the policy definitely wouldn't be rationally connected. However the inclusion of "eligible" suggests that the objective is implicitly aimed at giving priority to certain family members. When the policy is looked at in the context of the other Family category criteria, it is obvious that policy's focus is on whether the nucleus of the family is in New Zealand. Adult children or siblings cannot apply if they are married, living in a permanent relationship, or have children. Parents of New Zealand residents or citizens may not apply if they have more dependent children in their home country than adult children in New Zealand.

With a limit on the number of immigrants who can enter each year, the Government may think it is preferable to give priority to those whose family is almost entirely in New Zealand. If this view is correct then the discrimination against married siblings may be the least limiting option. When the policy is balanced against the objective, the harm is proportionate to the importance of the objective. This policy probably constitutes a reasonable limit.

(iii) Homosexual partners

The policy requiring homosexual partners to live together for two years longer than heterosexual partners before they can apply under the Family category has no rational connection to the general objectives. However, because the Family objective refers to "eligible" spouses and partners it is rationally connected to the policy. However, it is not the least limiting option. The least limiting option would be to treat homosexual and heterosexual couples the same way. This would remove the discrimination altogether. As it stands, the policy is not a reasonable limit.

(c) Pitcairn Island policy

The policy of imposing lower entry requirements and the objective of this category are rationally. The policy is also the least limiting option. Is the importance of the objective proportionate to the policy's effect on the right to be free from discrimination on the basis of nationality? The answer must be yes. This policy is akin to affirmative action because it offers special assistance to individuals who are disadvantaged, although by circumstances other than discrimination.

Under the second approach, those policies that impose reasonable limits on the freedom from discrimination are not in breach of the Bill of Rights nor ultra vires the Immigration Act. The only policies that appear to fall into this category are the good health requirement, the exclusion of married sibling or children from the Family category, and the concessions made for Pitcairn Islander. The policies that are not reasonable limits are ultra vires. The policies that fall into this category are: the exclusion of more than one partner in a polygamous marriage; the allocation of points based on age; the exclusion of homosexual partners under the General Skills and Business Investor categories; the language requirements; the minimum work experience requirement; and the additional length of cohabitation required before homosexual partners are allowed to apply under the Family category.

VII SUMMARY AND CONCLUSIONS

In the process of deciding whether Government residence policy breached the Bill of Rights, I discussed the legal status of the policy and concluded that it had not been altered by the new provisions of the Immigration Act. They remain a set of voluntary rules. I also discussed the effect of the Human Rights Act on the Bill of Rights and concluded that it had no significant impact. The Bill of Rights is separate remedy.

The paper covered two ways of applying the operational provisions. The first approach gave priority to s6 of the Bill of Rights. Since the policy was produced under the authority of the Immigration Act, it was necessary to see whether the empowering provisions of the Immigration Act authorised the Minister and immigration officials to breach the Bill of Rights when granting residence visas and permits. The Immigration Act can be read consistently if the principle in *Slaight* is applied. This results in all the immigration policies that prima facie infringed the Bill of Rights, being ultra vires the Immigration Act. I argued that this approach is preferable when the Bill of Rights is applied to delegated powers. The second approach requires ss5 and 6 to be read together. It results in a "watering down" of the rights when they are applied to delegated powers because some of the infringements became excusable as "reasonable limits." Both approaches show that the current Government residence policy breaches the Bill of Rights.

One more question remains. Do rejected applicants have the right to bring an action for breach of the Bill of Rights against the New Zealand Government? The Bill of Rights does not say that the rights and freedoms it affirms belong only to New Zealand citizens or residents. Instead it says that government action will be subject to those rights and freedoms. Any applicant who is in New Zealand ought to be able to bring an action breach of the Act. It may also be possible for immediate relatives or associates to claim on behalf of an applicant by adopting a rule of standing consistent with s21(2)(a) of the Human Rights Act.

It is not clear whether the Act extends to applicants residing in other countries. The Canadian Charter of Rights and Freedoms does not apply to people who are not physically in Canada.[58] Should the New Zealand courts adopt the same view of our Bill of Rights? Several arguments support the extraterritorial application of the Bill of Rights. Firstly, foreign service officers are an extension of the Government so they are bound to act consistently with the Bill of Rights. Secondly, the Immigration Act has some

[58] *Canadian Council of Churches v Canada* [1990] 2 FC, 534; 10 Imm LR (2d) 81.

extraterritorial application because applications must satisfy its requirements and have a right of appeal under it, whether or not they are physically in New Zealand. There is no reason for applicants not to have a remedy under the Bill of Rights as well. Thirdly there is no breach of the sovereign power of another state, since no other state's laws or powers are affected in any way. The courts would be unduly timid if they failed to recognise the right of non-citizens to seek a remedy when the Government unlawfully discriminates against them.

How is this discussion affected by the fact that there is no right to be admitted to NZ? or to be given residence here?

Bibliography

Digests

Halsbury's Laws of England (4 ed, Butterworths, London, 1980).

New Zealand Commentary on Halsbury's Laws of England (4 ed, Butterworths, Wellington, 1985).

Texts

W Borrie *Immigration to New Zealand 1854 -1938* (Demography Programme, Research School of Social Sciences, Australian National University, Canberra, 1991).

G Ganz *Quasi-Legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell, London, 1987)

PA Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company Ltd, Sydney, 1993).

SH Legomsky *Immigration and the Judiciary: Law and Politics in Britain and America* (Clarendon Press, Oxford, 1987).

R Plender *International Migration Law* (2ed Martinus Nijhoff Publishers, Norwell, MA, 1988).

R Huscroft and P Rishworth (eds) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1991* (Brooker's Ltd, Wellington, 1995).

Journal Articles

R Baldwin and J Houghton "Circular Arguments: the Status and legitimacy of Administrative Rules" [1986] Public Law 239.

S Brawley "No 'White Policy' in NZ: Fact and Fiction in New Zealand's Asian Immigration Record, 1945-1978" (1993) 27 NZ Jnl History 16.

C Chauvel "New Zealand's Unlawful Immigration Policy" (1994) 4 Aust Gay & Lesbian LJ 78.

J Elkind "On the Limited Applicability of Section 4 of the Bill of Rights" [1993] NZLJ 111.

J McClean, P Rishworth, and M Taggert "The Impact of the New Zealand Bill of Rights on Administrative Law" The New Zealand Bill of Rights Act 1990 (Legal Research Foundation Seminar, 1992) 62.

P Rishworth "Applying the New Zealand Bill of Rights Act 1990 to Statutes" [1991] NZLR 337.

P Rishworth "How does the Bill of Rights Work? [1992] NZRLR 189.

P Rishworth and S Optican "Two Comments on *Ministry of Transport v Noort*" [1992] NZRL 189.

C Tie "Immigrant Selection and the Canadian Human Rights Act" (1994) 10 JL & Soc Pol'y 81.

Cases

Amin v Entry Clearance Officer, Bombay [1983] 2 All ER 864.
Canadian Council of Churches v Canada [1990] 2 FC, 534; 10 Imm LR (2d) 81.
Chiu v Minister of Immigration [1994] 2 NZLR 541.
Hyde v Hyde & Woodmansee (1966) [1861-73] All ER 175.
Menghani v Canada (Employment and Immigration Commission) [1992] 4 CHRD 41.
Naqvi v Canada (Employment and Immigration Commission) [1993] 2 CHRD 57.
Ministry of Transport v Noort [1992] 3 NZLR 260.
Ontario Human Rights Commission and O'Malley v Simpson Sears [1985] 2 SCR 536.
Quilter v Attorney General Unreported, 28 May 1996, High Court, Auckland Registry, M.177/96.
R v Chaulk (1991) 2 CR (4th) 1
R v Chief Immigration Officer, ex p. Bibi [1976] 1 WLR 979.
R v Oakes [19868] 1 SCR 103.
R v Thomsen (1988) 63 CR (3d) 1.

1
Folder
Ry

Ryan, Kristina
Does New Zealand's immigration policy breach the Bill of Rights